Re Sin Lee Sang Sawmill Sdn Bhd; Leong Thong & Anor v Chong Thim & Ors

HIGH COURT (IPOH) — COMPANIES WINDING UP NO 42-66-88
ABDUL MALEK J
21 AUGUST 1989

Companies and Corporations — Winding-up petition — Petitioners were managing director and executive director — Petitioners also minority shareholders — Management of company — Whether affairs of company and powers of directors exercised in a manner oppressive to shareholders — Whether just and equitable to wind up company — Companies Act 1965, ss 181 & 218

The petitioners had petitioned for the winding-up order against Sin Lee Sang Sawmill Sdn Bhd on the grounds that its accounts had not been lodged with the Registrar of Companies; that there were serious irregularities in the accounts; that the respondents had manipulated the accounts; that the company was in serious financial difficulties; and that the respondents were trying to remove the petitioners as directors of the company. The petitioners were minority shareholders but they had been the managing director and executive director since 1985 and signed the company's cheques. However, they maintained that two of the respondents, as chairman and director and also related to each other, had full management and control of the company. Further, the first petitioner as managing director was not involved in the daily affairs of the company as he had to attend to personal matters. It was also alleged that the respondents who were offering to sell the company for $600,000 had also refused the petitioners an opportunity to purchase the company for that price. Two of the respondents had called for an extraordinary general meeting ('EGM') to pass a resolution to remove the petitioners as directors but was called off as the petitioners pointed out that it was not called in compliance with the Companies Act 1965 ('the Act'). It was submitted that the respondents, in their attempts to remove the petitioners, were intending to sanction all backdated transactions, conceal all misappropriations and falsify accounts to lower the value of the shares. The respondents argued that by granting the petition, it would mean that the court accepted that the petitioners were in control since 1985 and would not have to answer for misdeeds after the grant. Affidavits exhibiting the agenda and minutes of a meeting in April 1985 stated that both petitioners were authorized to manage and administer the company. The accounts could not be manipulated as other directors did not sign the cheques, vouchers and receipts. The EGM called was to get an explanation from the petitioners who could not satisfactorily explain to the auditors. The respondents would be left in the lurch in answering the auditors if the petition was granted.

Held, dismissing the petition with costs:

(1) The petitioners were in control of the management of the company. As such, the court fails to see how they can even suggest that the affairs of the company and the powers of the directors had been exercised in a manner oppressive to shareholders under s 181 of the Act.

(2) The court is also in no position to hold that the circumstances come within the ambit of any of the provisions laid out in s 218(1) of the Act. This is not a case where the court could form the opinion that it would be just and equitable for the company to be wound up. The real purpose of the petitioners was just to teach the respondents a lesson.

Cases referred to

1 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227
2 *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326

Legislation referred to

Companies Act 1965 ss 181, 218

VS Viswanathan and *Teresita Antoinette (Ms)* for the petitioners.

Ng Chee Kong for the respondents.

Cur Adv Vult

Abdul Malek J: The petitioners had petitioned for a winding-up order against Sin Lee Sang Sawmill Sdn Bhd (hereinafter 'the company') on the grounds that its accounts had not been lodged with the Registrar of Companies, that there were serious irregularities in the accounts, that the respondents had manipulated the accounts, that the company was in serious financial difficulties and that the respondents were trying to remove the petitioners as directors of the company.

The company had been incorporated under the Companies Act 1965 (hereinafter 'the Act') on March 1983 with its registered office at 72 Market Street, Ipoh. It is not disputed that the petitioners had 64,749 shares in the company while the three majority shareholders Chong Thim, Chong Fook and Chong Sooi ('the respondents') had 166,678, 41,125 and 41,125 share respectively.

In their petition, the petitioners stated that although they were the minority shareholders, they had been the managing director and executive director respectively of the company since 1985. However, they maintained that Chong Thim and Chong Fook, as chairman and director respectively of the company and also being related to one another, had full management and control of the company. The first petitioner had also averred that although he was the managing director, he did not get involved in the daily affairs of the company as he had to attend to his personal matters which was agreed to by all the directors. He also added that his daughter was working as a clerk for the company. The petitioners also alleged that two relatives of the other two directors were completely managing the business of the company. They admitted, however, to having signed the company's cheques.

The petitioners further stated that they had lodged a police report on 16 October 1988 as regards the non-accountability of about $22,780.45 received by an employee of the company and that on 29 October 1988 they had made a written complaint to the Registrar of Companies as regards the company not submitting the audited accounts. Although the company was trying to sell itself for $600,000 to pay off its liabilities amounting to $500,000, the petitioners allege that the respondents had refused the petitioners the opportunity to purchase the same at $600,000.

The petitioners also alleged that Chong Fook and Chong Sooi had acted in their own interests rather than in the interest of the shareholders as a whole and had in fact, at an extraordinary general meeting held on 16 October 1988, passed a resolution to remove the petitioners as directors but changed their minds when the petitioners had pointed out to them that the meeting had not been called in compliance with the Act.

It is relevant at this juncture to state that the petitioners had applied by way of an ex parte summons-in-chambers filed on 2 November 1988 for an order that the company be restrained from holding the extraordinary general meeting to be held on 9 November 1988 at 10am at the company's premises at SD9/1070, Jalan Menglembu, Ipoh with costs and this had been granted by the court on 3 November 1988 with an order that there should be an undertaking for damages, if any, to be sustained by the company as a result of the injunction.

Learned counsel for the petitioners had submitted that the respondents, in their attempts to remove the petitioners, were intending to sanction all backdated transactions, conceal all misappropriations and falsify accounts to lower the value of its shares. In reply, learned counsel for the respondents argued that the grant of the petition would mean that the court accepted the fact that the petitioners were in control of the company since 1985 and they would not have to answer for their misdeeds after the said order. The only issue, he contended, was who was in control of the company and accordingly referred to the affidavit of the petitioners filed on 4 April 1989 which had exhibited the agenda and minutes of a directors' meeting held by the company on 12 April 1985 which had stated that the first petitioner had been appointed the sales manager and that both petitioners as directors were authorized to manage and administer the company.

He agreed, however, that the company was in financial difficulties but the bank had only frozen its accounts in August 1988. He also submitted that the respondents could not manipulate its accounts when the directors other than the petitioners did not sign the cheques, vouchers and receipts. He added that the respondents had called for the extraordinary general meeting to get an explanation from the petitioners who could not satisfactorily explain to the auditors. If the petition was granted, counsel said that the respondents would be left in the lurch in answering the auditors. Learned counsel went on to say that since the respondents took over the management, the company had made profits.

Having perused the numerous affidavits and considered the submissions in the light of the Act, I fail to see how the petitioners, who I found to be in control of the management of the company, can even suggest that the affairs of the company and the powers of the directors are being exercised in a manner oppressive to shareholders of the company under s 181 of the Act.

In *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors* v *Ling Beng Sung*,[1] the Privy Council had declared that:

> For the case to be brought within s 181(1)(a) of the Companies Act 1965 at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possessed a majority of the voting power and, in reliance upon that power, made policy or executive decisions, with which the complainant did not agree, was not enough. There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect before a case of oppression could be made out. Similarly 'disregard' involved something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure.

In the circumstances, the court is also in no position to hold that this particular situation comes within the ambit of any of the provisions laid out in s 218(1) of the Act. Again, reference is being made to the *Re Kong Thai Sawmill* case[1] where it had been held that:

> The grant of winding up was in the discretion of the court. In exercising this discretion the court would have in mind the character of the remedy, if sought to be applied to a company which was a going concern; it would take into account, inter alia, the gravity of the case made out under s 181(1) of the Companies Act 1965; the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; and the interests of other members of the company not involved in the proceedings. In this case the respondent had failed completely to make out a case for winding up the company.

In the event, I came to the conclusion that this was not a case where the court could form the opinion that it would be just and equitable for the company to be wound up. On this point, I would make reference to *Re Senson Auto Supplies Sdn Bhd*[2] where the headnote reads:

> The words 'just and equitable' in s 218(1)(i) of the Companies Act enable the court to subject the exercise of legal rights to equitable considerations, that is to say, considerations of a personal character arising from one individual and another which may render it unjust or inequitable to insist on legal rights or to exercise them in a particular way. Even if the directors or majority shareholders have been guilty of improper or unreasonable conduct so that there appears to be a prima facie case for relief, it will be refused if the real purpose of the petitioners is to obtain payment of a money owed by the company. It is settled law that delay by petitioners in initiating proceedings after they have realized that they have been victims of a scheme of oppression will induce the court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith. In the present case there was inordinate delay in the presentation of the petition sufficient to debar the petitioners from relief by way of an order for winding up. The court was not satisfied that the charges of

oppression or discrimination were made out and neither was it satisfied that it would be just and equitable to wind up the company.

These findings are also relevant to our case except the real purpose of the petitioners here, to my mind, was just to teach the respondents a lesson.

I had accordingly dismissed the petition with costs. As regards the injunction order given on 3 November 1988, although counsel for the petitioners had submitted that no damages had been proved and counsel for the respondents had asked for it to be set aside with damages to be assessed and to be payable by the petitioners, I had refused to make any order since there had been no formal application to set it aside.

Petition dismissed.

Solicitors: *Kean Chye & Sivalingam; Almeida & Co; Ng Chee Kong & Co.*

Reported by *Yap Shao Sin*

Major Phang Yat Foo v Brigadier Jeneral Dato' Yahaya bin Yusof & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8-25-41-1989
EUSOFF CHIN J
2 AUGUST 1989

Armed Forces — Court-martial — Plea in bar of trial — Finding of not guilty — Whether confirming officer has power to confirm, withhold or refuse confirmation of finding of not guilty — Whether jurisdiction conferred on convening authority to reconvene a court-martial — Res judicata — Armed Forces Act 1972, ss 122, 123, 124, 125 & 146 — Armed Forces (Court-Martial) Rules of Procedure 1976, r 63 — Interpretation Act 1967, s 25

Administrative Law — Certiorari — Application to quash decision of respondents to convene fresh court martial — Whether rules in delegated legislation inconsistent and ultra vires parent Act — Armed Forces Act 1967, s 146(1) — Armed Forces (Court-Martial) Rules of Procedure 1976, r 63(3)

The applicant applied for an order of certiorari to quash the decision of the first respondent disapproving the decision of a court-martial and ordering the convening of a fresh court-martial to try the applicant and an order to prohibit the first respondent from convening a fresh court-martial to retry the applicant. The first respondent had convened a court-martial to try the applicant on eight charges. The applicant offered a plea in bar of trial in reliance upon s 146(1)(c) of the Armed Forces Act 1972 ('the Act'). The court-martial heard the evidence adduced and submissions by both the applicant and the prosecutor as provided under r 63(1)(a) and (b) of the Armed Forces (Court-Martial) Rules of Procedure 1976 ('the Rules'). The court-martial allowed the plea in bar of trial and reported its decision to the first respondent who was the convening officer who then purported to act under r 63(3)(b)(ii) of the Rules, disapproved the decision and made an order that a fresh court-martial would be convened to retry the applicant.

The applicant argued that (i) the said decision of the first respondent was wrong in law; (ii) the said decision was contrary to the provisions of s 146 of the Act; (iii) the said decision was made without or in excess of jurisdiction and ultra vires the Act. It was submitted that r 63(3) is invalid since the rule-making power given to the Minister of Defence by s 119 of the Act does not give the Minister the power to confer jurisdiction on the convening authority to reconvene a court-martial and is also inconsistent with s 146 of the Act.

Held, allowing the application:

(1) The courts do not act on their own motion or initiative to determine the vires of delegated legislation. The question of invalidity of a subsidiary legislation can be raised by way of a defence to a civil claim based on the subsidiary legislation or as a defence to a prosecution of an offence under a subsidiary legislation or a person may also challenge an action taken under subsidiary legislation by arguing against its validity.

(2) It is clear that s 119 of the Act gives power to the Minister to make rules of procedure only but not to make rules conferring jurisdiction on any person.

(3) Under s 126 of the Act, a 'confirming officer' has the power to confirm the finding or sentence of a court-martial. It does not give the power to confirm, to withhold or to refuse confirmation of a finding of not guilty made by a court-martial. It appears that the intention of Parliament is that there is a need for an order made by a court-martial to be confirmed by a confirming officer only where the court-martial has found an accused guilty of any charge. Therefore, where a court-martial has found an accused person not guilty of the offence charged, or as in this case, that the court-martial had found that the offence had been condoned by his commanding officer, the Act does not require, and does not confer any power on, a confirming officer or any other person to approve or confirm such finding or order made by the court martial.

(4) The provisions of s 146(1) of the Act are quite clear that once the court-martial has decided that an offence committed by the accused has been condoned by his commanding officer, the convening officer has to accept that finding or decision, and he cannot convene another court-martial to retry the accused on the same charges. Therefore, r 63(3) is void to the extent that it confers jurisdiction on the convening authority to disapprove a decision of a court-martial allowing a plea in bar of trial because such rule is inconsistent with ss 122 to 125 of the Act; it is also void to the extent that it confers jurisdiction on the convening authority to convene a fresh court-martial to try the accused on the same charges which a court-martial has found to have been condoned by the accused's commanding officer because this provision is inconsistent with s 146(1) of the Act.

(5) It can be seen quite clearly that the purpose of the first respondent's decision to convene a fresh court-martial is to enable the prosecutor to put in the first respondent's own opinion that one Lt Col Yeoh was not the proper commanding officer of the applicant in the form of fresh evidence so that the fresh court-martial will reject the plea in bar of trial put by the applicant. It is not disputed that the court-martial had been properly constituted and competent to hear and had heard evidence and arguments before making its decision. The matter is res judicata.

Case referred to

1 *Shedden* v *Chelmsford* [1861-73] All ER 724 (refd)